UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT REYNOLDS, and the ESTATE OF DALE C. ECKERT CORPORATION, Plaintiffs-Appellants, vs. PHILLIP B. WAGNER, et al., Defendants-Appellees.	No. 93-56629 DC# CV-91-00395-GLT Central California (Santa Ana) ORDER (Filed Dec. 22, 1993)

Before: NOONAN and TROTT, Circuit Judges

Appellees' motions to dismiss the appeal are denied. *See* Fed. R. Civ. P. 6(a).

The briefing schedule established by the Clerk shall remain in effect.

APPENDIX G

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION, Appellants. vs. PHILIP B. WAGNER and WILLIAM SIMON, Appellees.	NO. 93-56629 DIST CT. NO. SAVCB91-395 GLT MOTION FOR RECONSIDERATION OF APPELLEE SIMON'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, as soon as the matter may be heard in the above-entitled Court, located at 121 Spear Street, San Francisco, California, Appellee William Simon will, and hereby does, petition the Court to reconsider his motion for an order dismissing the appeal of

Appellant Estate of Dale C. Eckert Corporation (Estate of Eckert) for lack of subject matter jurisdiction.

This petition is brought pursuant to Federal Rule of Appellate Procedure 40 and Circuit Rule 27-10, and will be based upon this notice, the attached memorandum of points and authorities, the attached exhibits, all pleadings and papers on file herein, and upon such other evidence that may be considered during the determination of this petition.

DATED: January 5, 1994

Respectfully submitted,

WEHNER AND PERLMAN
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MEMORANDUM OF POINTS AND AUTHORITES

I. INTRODUCTION

On December 22, 1993, an order was filed by this Court denying Appellee William Simon's motion to dismiss this appeal,[1] based solely upon Federal Rule of Civil Procedure 6(a). It is respectfully submitted that the Court overlooked or misapprehended the threshold issue of the failure of the Estate of Dale C. Eckert Corporation (Estate of Eckert) to appeal the judgment against it within the 30-day period prescribed by Federal Rule of Appellate Procedure 4(a)(1). It is well settled that the timely filing of a notice of appeal is jurisdictional, and that this Court lacks the power to adjudicate cases in which an appeal was not timely filed. Consequently, the failure of the Estate of Eckert to file its notice of appeal until after the 30-day period had expired prevents the Court from entertaining the instant appeal.

Mr. Simon's motion to dismiss this appeal was directed primarily toward this Court's lack of jurisdiction, but also addressed the District Court's lack of jurisdiction to extend the time for filing an appeal without a showing of excusable neglect, as required by Federal Rule of Appellate Procedure 4(a)(5). Once the Estate of Eckert let the 30-day period set forth by Rule 4(a)(1) of the Federal Rules of Appellate Procedure expire without filing a notice of appeal or a motion to extend the time for appeal, an extension in the appeal time could only be

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[1] Mr. Simon filed his motion to dismiss this appeal, accompanied by supporting exhibits, (copies of which are attached hereto respectively as Exhibits A and B) on or about December 10, 1993.

granted upon a showing of excusable neglect. The Estate of Eckert neither made such a showing, nor did it seek to establish excusable neglect. Although the Estate of Eckert argued that it needed additional time in which to consider an appeal, its reason for an extension was patently insufficient under both the good cause or excusable neglect standards.

In determining Mr. Simon's motion to dismiss the appeal, the Court relied solely upon Federal Rule of Civil Procedure 6(a) (attached hereto as Exhibit C), which sets forth the computation of time for filing documents when the last day to file falls upon a weekend or holiday when the time prescribed to file a document is less than 11 days. It is respectfully submitted that Federal Rule of Civil Procedure 6(a) is inapplicable to the jurisdictional issue since the last day of the initial 30-day period for filing a notice of appeal fell on October 1, 1993, a Friday, which was not a legal holiday; and because the District Court lacked authority to extend the time for filing a notice of appeal after that 30 day period when no "excuseable neglect" was demonstrated or even advanced. Consequently, Federal Rule of Civil Procedure 6(a) did not impact the expiration of the Estate of Eckert's time within which the notice of appeal was required to be filed and jurisdiction does not exist for this appeal.

Additionally, Federal Rule of Civil Procedure 6(a) and Federal Rule of Appellate Procedure 4(a)(5) would only have allowed an extension of time until November 12, 1993 (ten days from the entry of the extension order on October 28, 1993, excluding intermediate weekends and holidays), not until November 15, 1993, as granted by the District Court. Consequently, the District Court Order

(sought after expiration of the juridictional 30 day period for filing the notice of appeal was was an abuse of discretion.

II. APPELLANT FAILED TO FILE A NOTICE OF APPEAL, OR MOTION TO EXTEND THE TIME FOR APPEAL, BEFORE THE RUNNING OF THE 30-DAY PERIOD AND ITS APPEAL IS UNTIMELY

As set forth more fully in Mr. Simon's motion to dismiss, the Estate of Eckert failed to timely appeal after a judgment was entered against it on September 1, 1993. According to Rule 4(a)(1) of the Federal Rules of Appellate Procedure,[2] the Estate of Eckert was required to file its notice of appeal, if an appeal were contemplated, within "30 days after the date of entry of the judgment or order appealed from." In other words, the Estate of Eckert had until October 1, 1993, to file its appeal. It failed do so, and did not move for an extension of time to appeal until October 4, 1993. As a result, the Estate of Eckert's appeal is untimely and this Court lacks jurisdiction to hear the appeal. *Browder v. Department of Corrections*, 434 U.S. 257 (1978); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992); *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 908-09 (7th Cir. 1989).

Although the Court cited Federal Rule of Civil Procedure 6(a), in its denial of Mr. Simon's motion to dismiss, that rule is inapplicable since the last day to file an

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[2] Unless specifically stated otherwise, all rules cited herein refer to the Federal Rules of Appellate Procedure.

appeal fell on a Friday that was not a national holiday.[3] Nor could any provision of Federal Rule of Civil Procedure 6 have impacted the expiration of the Estate of Eckert's appeal time since subsection (b) of that rule specifically does not apply to Rule 4(a), subsections (c) and (d) are irrelevant, and subsection (e) could not have extended the time for appeal. *See* Fed. R. Civ. P. 77(d); *Lashley v. Ford Motor Co.*, 518 F.2d 749, 750 (5th Cir. 1975).

III. THE DISTRICT COURT HAD NO JURISDICTION, AFTER THE EXPIRATION OF THE 30-DAY PERIOD, TO EXTEND THE TIME FOR AN APPEAL ABSENT A SHOWING OF EXCUSABLE NEGLECT

As stated previously, if a party does not move for an extension of time within the 30-day period set forth in

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[3] Federal Rule of Civil Procedure 6(a) is, in relevant part, as follows:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Rule 4(a)(1), *the good cause standard is inapplicable and the party must meet the higher burden of excusable neglect. Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *see also Pearson v. Gatto*, 933 F.2d 521, 524 (7th Cir. 1991); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 n.3 (5th Cir. 1990); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988); *In re "Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*, 474 U.S. 1032 (1985). Here, the Estate of Eckert's motion for an extension *was based solely upon its desire to have additional time within which to consider an appeal* – a patently insufficient reason to establish even "good cause", much less the required "excusable neglect". Consequently, the District Court's granting of an extension without such a showing was an abuse of discretion.

Furthermore, even if the good cause standard had been applicable (which it was not), the Estate of Eckert failed even to demonstrate good cause. Good cause refers to circumstances beyond a party's control, such as a mistake or delay by court personnel, not a failure to obtain a meeting with a client to discuss the possibility of an appeal. *See Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (court's delay in filing a notice after timely receiving it, constituted good cause); *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990) (justifiable reliance on clerk's erroneous information regarding time to appeal constituted good cause). Conversely, *circumstances within a party's control do not constitute good cause. See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (counsel's mistake in

referring to parties with the term *"et al."* did not constitute good cause); *Wright v. Deyton*, 757 F.2d 1253, 1255 n.5 (11th Cir. 1985) ("a litigant cannot sit idly by and allow his filing deadline to approach and then argue that compliance with the deadline should be excused since his letter was posted in sufficient time to meet the deadline if the mail had followed its ordinary course"). Accordingly, the District Court abused its discretion in granting Appellant's motion to extend the appeal time in this case.

IV. THE DISTRICT COURT WAS WITHOUT AUTHORITY TO GRANT AN EXTENSION UNTIL NOVEMBER 15, 1993

Although the Estate of Eckert should not have been allowed to file a notice of appeal after its time to do so expired, it also should not have been given until November 15, 1993, to file its appeal. Pursuant to Rule 4(a)(5), an extension of time may be given "not later than 30 days after the expiration of the time prescribed by . . . Rule 4(a)[(1)]. . . . or 10 days from the date of entry of the order granting the motion, *whichever occurs later.*" (Emphasis added.) Since the order granting the motion to extend the appeal time was entered on October 28, 1993, *the latest possible time to extend the appeal was November 12, 1993.*

In his motion to dismiss, Mr. Simon argued that last day to extend the appeal time was November 8, 1993. However, taking into consideration Federal Rule of Civil Procedure 6(a), time should have been added for all intermediate weekends and Veteran's Day. With all intermediate Saturdays, Sundays, and legal holidays accounted for, the last day of the extension should have

been no later than November 12, 1993.[4] Thus, the following chain of events, when analyzed objectively, demonstrate a substantial basis for the rehearing of Mr. Simon's motion to dismiss:

September 1, 1993	Judgment against the Estate of Eckert is entered.
October 1, 1993	Time for appeal expires – *no action is taken by the Estate of Eckert.*
October 4, 1993	The Estate of Eckert files its motion for an extension of time, based solely upon good cause.
October 28, 1993	An extension of time until November 15, 1993 is entered.
November 1, 1993	31 days from expiration of appeal time (the 30th day fell on a Sunday).
November 11, 1993	Veteran's Day
November 12, 1993	Last day to which an appeal could have been extended (excluding two weekends and Veteran's Day).
November 15, 1993	Notice of appeal filed by the Estate of Eckert.

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[4] Federal Rule of Civil Procedure 6(e) does not add additional time after entry of a judgment or order. *See* Fed. R. Civ. P. 77(d); *Lashley v. Ford Motor Co.*, 518 F.2d 749, 750 (5th Cir. 1975).

V. CONCLUSION

For the all the foregoing reasons, Appellee Simon respectfully requests that the Court reconsider this motion to dismiss the appeal of the Estate of Eckert, as well as any other and further relief that the Court deems appropriate.

DATED: January 5, 1994

Respectfully submitted,

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